Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 04-405
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements	)	

COMMENTS OF SBC COMMUNICATIONS INC.

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I. INTRODUCTION AND SUMMARY

SBC Communications, Inc., and its affiliated companies (collectively, SBC) submit the following reply comments to address two general arguments raised by opponents of BellSouth's above-captioned petition for forbearance.[1]

First, some commenters argue that the Commission should deny BellSouth's petition because the broadband marketplace is not competitive and the Commission cannot rely on market forces to protect against anti-competitive behavior. But contrary to these dubious assertions, there is ample evidence of strong competition in the market for broadband services. In fact, it is precisely because of this intense competition that legacy common carrier regulations and *Computer Inquiry* requirements are not warranted for wireline broadband services.

Second, some commenters attempt to draw purported economic and technical distinctions between wireline broadband services and cable broadband services in an effort to justify the disparate regulatory treatment between these two services. These purported distinctions are entirely baseless and cannot excuse the Commission's failure to level the regulatory playing field between cable broadband providers and wireline broadband providers -- a failure that is tremendously disappointing given the two major wireline broadband rulemaking proceedings (the *Non-Dominance NPRM* and the *Wireline Broadband NPRM*) that have been pending at the Commission for *three years*.[2] Indeed, in light of this failure, the Commission should immediately grant BellSouth's petition and eliminate the outmoded and unwarranted legacy regulations that are impeding full and fair competition in the broadband marketplace.

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[1] Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements, WC Docket No. 04-405 (Oct. 27, 2004) (BellSouth Petition).

[2] *See* SBC Comments at 1-2 (referencing *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Non-Dominance NPRM*); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*)).

II. DISCUSSION

A. Despite Some Commenters' Claims to the Contrary, the Broadband Market is Highly Competitive.

Some opponents of BellSouth's petition claim that the regulations from which BellSouth seeks forbearance are still necessary because the market for broadband services is not competitive. They assert that the broadband market is essentially limited to two providers, cable companies and incumbent telephone companies, and therefore the Commission cannot rely on market forces to ensure the widespread deployment of affordable broadband.[3] Predictably, they allege that "more regulation" is the only way to promote broadband competition.[4] These claims, however, are squarely at odds with the competitive realities of the broadband marketplace, the Commission's own findings about broadband competition, and the conclusions of the D.C. Circuit.

There is no serious dispute that cable providers continue to maintain a commanding lead in the market for broadband services. The Commission's own data show that, as of June 2004, there were roughly 32.5 million high-speed lines in the U.S. (at least 200 Kbps in one direction), and cable companies controlled 18.6 million (57 percent) of those lines.[5] By contrast all four RBOCs combined provided service to only 10.3 million high-speed lines (32 percent of the market).[6] Cable's commanding lead in the market for "advanced services" (at least 200 kbps in

[3] *See* ALTS Comments at 4; AT&T Comments at 34-38; FISPA Comments at 33-36; Local Government Coalition at 11; Vonage Comments at 13.

[4] *See* Bayou Internet Comments at 2 ("BellSouth needs more regulation."); FISPA Comments at 6 (common carrier regulations and *Computer Inquiry* requirements "should be extended to other broadband platforms and enforced with vigor").

[5] *High-Speed Services for Internet Access: Status as of June 30, 2004*, Wireline Competition Bureau, FCC, at Table 1, Chart 2 (Dec. 2004) (*FCC December 2004 Broadband Data Report*).

[6] *Id*. at Table 5.

both directions) is far more striking: 17.6 million cable modem lines (75 percent of the market) compared to 5.2 million ADSL and "other wireline" lines (22 percent of the market).[7] As BellSouth and others have made clear, if, as the Commission has already decided, legacy Title II common carrier regulations and the *Computer Inquiry* requirements are not necessary for the market-leading cable broadband industry, then they are certainly not necessary for the second-place wireline broadband industry.[8]

Despite the irrefutable logic of BellSouth's argument, some commenters allege that the broadband market is merely a duopoly between cable companies and incumbent telephone companies, and the Commission must maintain its legacy wireline regulations to guard against anti-competitive behavior.[9] But all that these commenters offer in support of their arguments is a superficial analysis of broadband market *share* without any real consideration of broadband market *behavior*. Indeed, to stay competitive with cable companies and other broadband providers, SBC and other wireline providers have been *lowering* the price of DSL Internet access service and rolling out higher-speed broadband offerings.[10] At the same time, satellite providers, licensed wireless providers offering both fixed and mobile services, providers of unlicensed

[7] *Id.* at Table 2, Chart 4.

[8] *See* BellSouth Petition at 13-15; SBC Comments at 5-9.

[9] *See supra* note 3.

[10] *See* SBC Reply Comments, GN Docket No. 04-54 (filed May 24, 2004) at 3-8. *See also* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c), WC Docket No. 04-416 (Nov. 10, 2004) at 16-17 (explaining that demand for xDSL service is elastic). SBC's separate affiliate, SBC Internet Services (SBCIS), is the entity that actually provides DSL Internet access service to consumers. SBCIS purchases wholesale DSL transport from SBC Advanced Solutions, Inc. (ASI), which is SBC's advanced services separate affiliate. For the sake of simplicity, however, we refer to SBC as the provider of DSL Internet access service in these comments.

wireless services (such as Wi-Fi), and broadband over powerline (BPL) companies are all offering innovative new broadband services that compete for consumer dollars.[11]

In fact, the very same commenters that decry the lack of competitive offerings in the broadband marketplace are now proudly touting competitive alternatives to ILEC broadband services. MCI, for example, claims that without the continued imposition of Title II common carrier regulations and the *Computer Inquiry* requirements, "ISPs would have no alternatives for underlying transmission services."[12] But just this month MCI announced that it "is expanding its Internet Broadband portfolio to include high-speed cable access," and through its relationship with New Edge Networks, "MCI is making available asymmetric cable service from Charter, Cox Communications and Time Warner Cable."[13]

Similarly, Earthlink argues for the continued imposition of common carrier regulations because "competition is not coming from multiple sources and technologies."[14] Yet the very same Earthlink offers its information services over a variety of broadband platforms today, including cable, DSL, satellite, fixed wireless, and mobile wireless.[15] Earthlink has also

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[11] *See Broadband Competition: May 2004* (attached as Appendix A to Competition in the Provision of Voice over IP and Other IP-Enabled Services, WC Docket No. 04-36, jointly filed May 28, 2004 by BellSouth, Qwest, SBC and Verizon) (describing intense competition for broadband services in the mass market and in the enterprise market); *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208 at 14-24 (Sept. 9, 2004) (*Fourth 706 Report*).

[12] MCI Comments at 10.

[13] *MCI Adds Cable to Internet Broadband Mix, Companies Can Utilize One Provider to Reach 90 Percent of U.S. Business Locations*, MCI Press Release (Jan. 11, 2005).

[14] Earthlink Comments at 21.

[15] *See* "Earthlink High Speed" web site, www.earthlink.net/home/broadband (offering "Earthlink Cable," "Earthlink DSL," "Earthlink Basic DSL," "Earthlink Satellite"); *Earthlink Partners with DigitalPath Networks to Offer Wireless Broadband in Northern California*, Earthlink Press Release (May 19, 2004) ("By partnering with DigitalPath, Earthlink is once again demonstrating that it will take advantage of multiple service platforms to best meet the high speed needs of its customers."); *Earthlink to Become First ISP to Offer Wireless Data and Voice Solutions*, Earthlink Press Release (March 22, 2004) ("Earthlink has served the data-focused mobile professional for the past four years with wireless services on a variety of platforms, utilizing several data networks including Mobitex, ReFLEX, DataTAC and CDMA 1xRTT.").

announced a trial with a Broadband over Power Line (BPL) provider and has partnered with an equipment vendor to offer a home networking service.[16] Thus, despite its rhetoric to the contrary, Earthlink appears to be quite successful in obtaining commercially-negotiated arrangements to offer its services over a wide range of networks and technologies.

While there seems to be a disconnect between some opposing commenters' words and deeds, this much is clear: since the Commission first began formally collecting broadband data in 1999, broadband speeds have increased, broadband prices have come down, new broadband providers have entered the market, and broadband services are being offered to ever greater numbers of residential and business customers.[17] The Commission itself recently cited "the existence of numerous emerging broadband competitors" and observed that "actual and potential intermodal competition" informs competitive decision-making in the marketplace.[18] The Commission also stated that "[t]he competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices."[19]

It is precisely because of these competitive pressures in the broadband marketplace that the Commission should reject arguments by FISPA and others that the *Computer Inquiry* requirements should be maintained and "private carriage" should be prohibited for broadband

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[16] *Progress Energy and Earthlink Testing Broadband Over Power Lines with Area Customers*, Earthlink Press Release (Feb. 18, 2004); *Earthlink to Offer Linksys Wired and Wireless Networking Products to High Speed Internet Subscribers*, Earthlink Pres Release (Dec. 17, 2003).

[17] *See supra* note 11; *FCC December 2004 Broadband Data Report* at Table 2, Chart 3, Table 6, Chart 10.

[18] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, FCC 04-254 ¶22 (released Oct. 27, 2004).

[19] *Fourth 706 Report* at 13.

services.[20] FISPA asserts that if BellSouth and other ILECs are given the freedom and flexibility to provide their broadband services through private carriage, rather than under legacy common carrier regulations, they will have "no incentive to fairly negotiate private contractual arrangements" and "could stonewall such requests by offering onerous and unconscionable rates, terms and conditions."[21] According to FISPA, "government regulation is *required* to balance the competing interests of public need . . . and private rights."[22]

But FISPA's call for continued regulation is entirely misplaced in today's competitive broadband marketplace and completely ignores this Commission's strong desire to let market forces, not government regulations, drive business decisions and service offerings. Indeed, when the Commission adopted the *Computer Inquiry* requirements more than two decades ago for the "one-wire world" existing at that time, it also pointed out that "the advent and growth of competition in a particular market *eliminates the need for continued regulation*."[23] The Commission more recently expressed this same preference for market forces over regulation when it stated that:

> Competitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest.[24]

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[20] FISPA Comments at 5-10. *See also* ALTS Comments at 6-10; Earthlink Comments at 18-22; ITAA Comments at 9-17.

[21] FISPA Comments at 6, 9.

[22] FISPA Comments at 7 (emphasis added).

[23] *See Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, CC Docket No. 81-893, Report and Order, 95 F.C.C.2d 1276 ¶ 38 (1983) (emphasis added).

[24] A*ccess Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 ¶ 263 (1997).

Indeed, the Commission has *already* chosen to rely on market forces, rather than regulations, to dictate behavior in the broadband marketplace. Almost three years ago, the Commission determined that private carriage is appropriate for the market-leading cable broadband providers and waived the *Computer Inquiry* requirements for cable broadband service.[25] And just this month in a brief to the Supreme Court, the Commission and the Department of Justice pointed out that common carrier regulation of cable modem service "could lead cable operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas. . . . Imposition of those obligations on cable operators could also discourage investment in facilities by competing Internet access providers."[26] It would thus be entirely arbitrary and capricious for the Commission to exempt cable modem service from common carrier regulations and *Computer Inquiry* requirements without taking the same action for the second-place wireline broadband providers.

But if there was any doubt about the sufficiency of competition in the broadband marketplace, the D.C. has Circuit has *already* said that it "agree[s] with the Commission" that there is "robust intermodal competition" between cable providers and incumbent telephone companies in the provision of broadband.[27] In light of this robust intermodal broadband competition, it is not surprising that the D.C. Circuit also admonished the Commission that "[i]n

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[25] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶¶ 45-55 (2002) (*Cable Modem Declaratory Ruling*)

[26] Brief for the Federal Petitioners, *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, Nos. 04-277 and 04-281, at 31 (Jan. 18, 2005).

[27] *USTA v. FCC*, 359 F.3d 554, 582. Indeed, the court concluded that "even if all CLECs were driven from the broadband market, mass market consumers would still have the benefits of competition between cable providers and ILECs." *Id*.

competitive markets, an ILEC can't be used as a piñata."[28] Yet, this is precisely what the Commission is doing by continuing to impose outmoded, legacy regulations on ILEC broadband services after having effectively exempted cable broadband from any such regulations. The Commission should immediately rectify its asymmetrical, heavy-handed regulatory treatment of ILEC broadband services by completing its long overdue wireline broadband rulemakings[29] and granting BellSouth's forbearance petition.

B. The Commission Should Reject Commenters' Attempts to Create Distinctions Where None Exist Between Wireline Broadband and Cable Broadband.

In an unconvincing attempt to maintain the Commission's biased regulatory regime for broadband, some commenters have tried to manufacture "historical" distinctions between wireline broadband services and cable broadband services that would purportedly warrant disparate regulatory treatment. But there are absolutely no differences -- historical or otherwise -- between wireline broadband and cable broadband that could possibly justify subjecting the second-place local telephone companies to *greater* regulatory burdens than the first-place cable companies.

ALTS, for example, claims there are "historical differences" between wireline and cable broadband services that "require different regulatory treatment."[30] One of these key differences, according to ALTS, is that "the telephone network was funded by ratepayer dollars under a governmentally sanctioned monopoly, while the cable broadband network was largely built on risk capital."[31] Thus, ALTS asserts, "there are compelling reasons to continue to regulate

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[28] *Id.* at 573.

[29] *See* SBC Comments at 1-2; 5-9.

[30] ALTS Comments at 5.

[31] ALTS Comments at 5. *See also* FISPA Comments at 31.

wireline broadband service providers as common carriers, regardless of how providers of cable modem services are categorized."[32]

ALTS' argument is nothing more than a classic bait-and-switch. ALTS first sets out the "bait" by describing alleged differences between wireline *telephone* networks and cable broadband networks. ALTS then executes the "switch" by implying, without a shred of support, that those same differences are present between wireline *broadband* services and cable broadband services. But ALTS' attempt to equate wireline broadband services with wireline telephone networks is pure fallacy. While many legacy telephone networks were built under rate-of-return regulations that offered the potential to earn a certain level of profit, ALTS completely fails to acknowledge that today's wireline telephone networks are, in fact, being built and maintained with risk capital. Indeed, all of the deployment, upgrades and maintenance of BOC wireline telephone networks over the last fifteen years occurred after the Commission's 1990 decision to replace rate-of-return regulation with price cap regulation for the BOCs.[33] Moreover, modern wireline *broadband* networks were first deployed on a significant scale in the late 1990's, well *after* the Commission had already ended rate-of-return regulation for the BOCs. Thus, whatever historical economic differences may (or may not) exist between legacy rate-of-return telephone networks and cable broadband networks, no such differences exist between wireline broadband networks and cable broadband networks.

In an equally fallacious line of reasoning, some commenters suggest that there are technical differences between wireline networks and cable networks that justify the continued

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[32] ALTS Comments at 6.

[33] *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990). *See also Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 ¶¶ 13-17 (2000) (comparing rate-of-return regulation to price cap regulation).

imposition of Title II common carrier regulations and *Computer Inquiry* requirements. According to ITAA for example, under the *Computer Inquiry* requirements, "ILEC-provided information services" were designed so that the underlying transmission capacity in the ILEC networks could be made available to third parties, while cable systems "were designed to provide one-way transmission of multi-channel video programming" and "historically have not been required to provide transmission service to others." [34] Thus, ITAA argues, "even if the Commission does not extend the *Computer II* unbundling obligations on cable-provided information services, it should retain those obligations for ILEC-provided information services."

But ITAA's argument puts the cart before the horse. There was nothing inherent in legacy wireline technology that enabled the BOCs to offer the transmission component of their information services to third parties. Rather, the Commission *ordered* the BOCs to perform "radical surgery" to make that transmission capacity available to third parties.[35] Thus, the purported "technical" distinction that ITAA and others attempt to draw between wireline broadband and cable broadband is not a technical distinction at all. Instead, it is a legacy *regulatory* distinction that forced the BOCs, at great expense and effort, to design their networks to meet the Commission's requirements.[36] Moreover, the original factual predicate for the *Computer Inquiry* requirements -- "a one-wire world" -- no longer exists.[37] As explained above, today's broadband marketplace is highly competitive and there is simply no reason to impose the

[34] ITAA Comments at 13-14. *See also* ALTS Comments at 5.

[35] *Cable Modem Declaratory Ruling* ¶ 43 (describing as "radical surgery" the *Computer Inquiry* process of extracting a telecommunications service from every information service and making it available as a stand-alone offering regulated under Title II).

[36] If faced with these same regulatory requirements, there is nothing to suggest that cable companies could not develop the same technical capabilities in their networks.

[37] *Non-Dominance NPRM* ¶ 5.

Computer Inquiry requirements on any broadband provider, least of all the second-place wireline broadband providers.

III. CONCLUSION

For the forgoing reasons, the Commission should grant BellSouth's petition for forbearance.

Respectfully Submitted,

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